Supreme Court, U.S.
FILED
DEC 5 - 2003
OFFICE OF THE CLERK

No. 03-396

In the Supreme Court of the United States

HARRY SHUSTER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
CHRISTOPHER A. WRAY
Assistant Attorney General
STEVEN L. LANE
Attorney
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the admission of redacted depositions at petitioner's trial violated the "rule of completeness" reflected in Federal Rule of Evidence 106.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. A7-A12) is not published in the *Federal Reporter*, but is *available at* 67 Fed. Appx. 645.[1]

JURISDICTION

The judgment of the court of appeals was entered on June 10, 2003. The petition for a writ of certiorari was filed on September 8, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

[1] The court of appeals' separate opinion addressing the government's appeal of petitioner's sentence (Pet. App. A1-A6) is reported at 331 F.3d 294.

STATEMENT

Following a jury trial in the United States District Court for the Eastern District of New York, petitioner was convicted of conspiring to commit securities fraud, in violation of 18 U.S.C. 371; securities fraud, in violation of 15 U.S.C. 78j(b); and conspiring to launder money, in violation of 18 U.S.C. 1956(h). Pet. App. B1. He was sentenced to 72 months of imprisonment, to be followed by three years of supervised release. *Id.* at B2. The court of appeals affirmed. *Id.* at A7-A12.

1. From approximately 1993 through 1997, petitioner participated in a "boiler room" scheme through which he arranged purchases from, and sales to, Stratton-Oakmont, Inc., a broker-dealer, of stock issued in several initial public offerings (IPOs). The scheme resulted in an artificial inflation of stock prices, from which petitioner profited by more than $2 million. Pet. App. A3.

Among other things, petitioner made several pre-arranged stock sales to Stratton-Oakmont upon his receipt of free stock provided to him as consideration for "bridge" loans he made to IPO issuers. Gov't C.A. Br. 3. Those "flips" and bridge loans provided Stratton-Oakmont with IPO stock that it could not purchase itself, and allowed Stratton-Oakmont to artificially inflate prices by controlling the supply of stock. *Ibid.* Petitioner and the principals of Stratton-Oakmont used Plus One Finance, Ltd., an off-shore entity controlled by petitioner, to conceal from securities regulators and tax officials the illegal gains produced by their "flip" and bridge loan transactions. *Id.* at 3-4. They also arranged for the discounted sale of unregistered stock to Plus One under Regulation S, an SEC regulation allowing certain transfers of unregistered securities to

foreign purchasers, and they resold the stock in the United States at a large profit. Petitioner and his co-conspirators falsely asserted that Plus One was a foreign purchaser, when Plus One in fact was under petitioner's control. *Id.* at 4.

On October 26, 2000, a grand jury returned a superseding indictment charging petitioner with conspiring to commit securities fraud, in violation of 18 U.S.C. 371 (Count 1); securities fraud, in violation of 15 U.S.C. 78j(b) (Counts 2-6); and conspiring to launder money, in violation of 18 U.S.C. 1956(h) (Count 7). 10/26/00 Superseding Indictment 8-26.

2. Before trial, the district court granted petitioner's motion to take the depositions of several persons outside the United States, including Walton Imrie and Stephen Screech, two asset managers at a Swiss investment firm, Kestrel S.A., who managed the affairs of Plus One for petitioner. Pet. 4. In his motion, petitioner asserted that "the essence of [petitioner's] alleged misconduct is his alleged ownership of Plus One," and that the requested depositions would establish that petitioner's mother rather than petitioner "was the beneficial owner of Plus One." Defendant's Motion to Take Depositions Under Federal Rule of Criminal Procedure 15(a) at 4-5.

The government moved *in limine* to exclude portions of the Imrie and Screech depositions from evidence as inadmissible hearsay, including testimony by Imrie and Screech that petitioner's family friend, Montague Koppel, had indicated to them that at least some Plus One assets were owned by petitioner's South African parents. 6/27/01 Gov't Letter to Dist. Ct. 2-3, 5-6. In response, petitioner argued that Koppel's statements to Imrie and Screech were admissible (1) under Federal Rule of Evidence 804(b)(3) as statements against

Koppel's penal and pecuniary interests; (2) for the non-hearsay purpose of explaining the deponents' conduct; (3) under Rule 806 to explain other hearsay statements petitioner expected the government to use at trial; or (4) under Rule 807, the residual exception to the hearsay rule. 7/02/01 Pet. Letter to Dist. Ct. 2-11. The district court rejected petitioner's contentions and granted the government's motion to redact the depositions. 7/05/01 Tr. 47-49.[2]

At trial, the government presented the live testimony of two of petitioner's co-conspirators, Jordan Belfort and Bryan Herman, who described petitioner's role in the fraudulent scheme. Gov't C.A. Br. 5-13. The government also introduced four binders of documents produced by Kestrel S.A. that demonstrated petitioner's control over Plus One as well as his use of Plus One to evade Regulation S and engage in numerous fraudulent stock transactions. *Id.* at 15-17. The government read the redacted versions of the Imrie and Screech depositions to the jury to explain the documents in the Kestrel binders and further describe petitioner's fraudulent conduct.[3]

Early in the trial, petitioner submitted a letter to the court in which he argued for the first time that "Imrie's testimony that * * * Koppel * * * told [Imrie] that certain funds belonged to [petitioner's father] and to

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[2] The court left open the possibility that Koppel's hearsay statements might be admissible if a particular declaration signed by Screech and Imrie (Form A), which reflected that petitioner was the beneficial owner of Plus One's funds, was admitted into evidence at trial. That declaration was not offered into evidence. Gov't C.A. Br. 55 n.9.

[3] 7/16/01 Tr. 1124-1130; 7/17/01 Tr. 1146-1237, 1336-1484; 7/18/01 Tr. 1523-1650, 1654-1754; 7/23/01 Tr. 2019-2247; 7/24/01 Tr. 2280-2296.

Koppel" should be admitted under the rule of completeness reflected in Federal Rule of Evidence 106. Pet. App. D2. Rule 106 provides that, "[w]hen a writing or recorded statement or part thereof is introduced by a party, an adverse party may require the introduction at that time of any other part or any other writing or recorded statement which ought in fairness to be considered contemporaneously with it." Petitioner asserted in his letter that, "[a]s redacted by the government, the [Imrie deposition] testimony now suggests that Imrie testified that he received the money for [petitioner] and took instructions from [petitioner] without any reference to the witness' understanding of whose funds he was holding." Pet. App. D3. Petitioner argued that the additional testimony he identified "should * * * be admitted so that the jury is not left with a misleading impression of [Imrie's] overall testimony." *Ibid.*

After the government had read a substantial portion of the redacted Imrie deposition to the jury, defense counsel again objected, asserting that "the testimony as redacted * * * distorts for the jury what was said by Mr. Koppel and understood by Mr. Imrie and I renew my application to have read to the jury the rest of the instructions that were given by Mr. Koppel to Mr. Imrie." 7/17/01 Tr. 1484-1485. The district court overruled the objection, stating that the "testimony regarding what Koppel said about the origin of the funds in Plus One finance that it was the parent's [sic] funds is an application to offer what is plainly hearsay. It's offered for the truth of it." *Id.* at 1485. The court added, "[e]xcluding it does not in the slightest fashion in my judgment render misleading the rest of this testimony in any way." *Ibid.* Later in the trial, after portions of the Screech deposition had been read to the

jury, petitioner moved for a mistrial "based on the completely distorted view that the Imrie and Screech testimony has provided this jury, as redacted." 7/23/01 Tr. 2208-2209. The district court denied the motion. *Id.* at 2009. At the conclusion of the trial, the jury found petitioner guilty on all counts.

3. The court of appeals affirmed in an unpublished opinion. Pet. App. A7-A12. The court held, *inter alia*, that "[t]he District Court did not exceed its discretion in determining that Koppel's [hearsay] statements [as related] in the depositions of Stephen Screech and Walton Imrie did not qualify as statements against interest under Fed. R. Evid. 804(b)(3)," and that, "[e]ven if those statements might qualify as statements against penal interest, [the district court] was entitled to conclude that the statements lacked requisite indications of reliability." *Id.* at A9.[4] The court did not specifically discuss petitioner's claim (Pet. C.A. Br. 61-62) that, even if Koppel's statements were hearsay, they nonetheless were admissible under the rule of completeness reflected in Rule 106. The court instead stated summarily that petitioner's "remaining conten-

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[4] The court of appeals also rejected (Pet. App. A8-A12) petitioner's claims that the district court had erred in: (i) prohibiting his cross-examination of a cooperating witness concerning audiotaped statements the witness made to a third party; (ii) refusing his motion to take Koppel's deposition and rejecting his claim that the government improperly failed to assist him in obtaining Koppel's live testimony at trial; (iii) excluding as inadmissible hearsay the affidavits of foreign witnesses and petitioner's mother; (iv) admitting evidence of petitioner's prior fraudulent conduct as evidence of his knowledge and intent; and (v) determining his sentence under the Sentencing Guidelines. Petitioner does not challenge those determinations in this Court.

tions have been considered and rejected as lacking merit." Pet. App. A12.

ARGUMENT

Petitioner renews his contention (Pet. 9-13) that the district court erred under Federal Rule of Evidence 106 by admitting redacted versions of the Imrie and Screech depositions. That contention does not warrant review.

Petitioner is correct in observing (Pet. 9-11) that the courts of appeals have expressed disagreement about whether the rule of completeness in Rule 106 can provide a basis for admitting evidence that otherwise would be inadmissible. The courts of appeals for the Second, Sixth, and Ninth Circuits have held that Rule 106 merely addresses the order of proof and does not contemplate the admission of evidence that is otherwise inadmissible. *United States* v. *Guevara*, 277 F.3d 111, 127 (2d Cir. 2001), cert. denied, 123 S. Ct. 1613 (2003); *United States* v. *Collicott*, 92 F.3d 973, 983 (9th Cir. 1996); *United States* v. *Costner*, 684 F.2d 370, 373 (6th Cir. 1982); see *United States* v. *Wilkerson*, 84 F.3d 692, 696 (4th Cir. 1996) ("even if * * * Rule 106 had applied to this testimony, it would not render admissible the evidence which is otherwise inadmissible"), cert. denied, 522 U.S. 934 (1997). The courts of appeals for the First and D.C. Circuits, by contrast, have stated that Rule 106 "concerns the substance of evidence" and "can adequately fulfill its function only by permitting the admission of some otherwise inadmissible evidence when the court finds in fairness that the proffered evidence should be considered contemporaneously." *United States* v. *Sutton*, 801 F.2d 1346, 1368 (D.C. Cir. 1986); accord *United States* v. *Awon*, 135 F.3d 96, 101 (1st Cir. 1998). Cf. *United States* v. *LeFevour*, 798 F.2d

977, 981 (7th Cir. 1986) (stating in dicta that if otherwise inadmissible evidence is necessary to correct misleading impression, then it either is admissible for that limited purpose or, if it is inadmissible (*e.g.*, because of privilege), the misleading evidence must also be excluded).[5] There is no warrant for reviewing that issue in this case, however, because the decisions below do not squarely implicate the disagreement on whether Rule 106 provides a basis for admitting evidence that would otherwise be inadmissible.

First, whereas the decisions relied on by petitioner involved the admission into evidence of conversations recorded by a cooperating witness, see *Sutton*, 801 F.2d at 1356, 1366-1368; *LeFevour*, 798 F.2d at 980-982, or of recorded statements made to the police, see *Awon*, 135 F.3d at 99, 101, this case involves the admission of testimony in a deposition. Because the purpose of a deposition is to preserve the witness's testimony for trial, see

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[5] Although petitioner asserts (Pet. i) that the Third Circuit agrees with the First, Seventh, and District of Columbia Circuits, he cites no Third Circuit decision resolving the issue, and there appears to be none. The Eighth Circuit has held that Rule 106 does not empower a court "to admit *unrelated* hearsay in the interest of fairness and completeness when that hearsay does not come within a defined hearsay exception." *United States* v. *Woolbright*, 831 F.2d 1390, 1395 (8th Cir. 1987) (emphasis added). That court has suggested, however, that when one portion of a conversation is admitted into evidence, the rule of completeness might permit the admission of related portions of the same conversation that otherwise would be inadmissible hearsay. *United States* v. *Williams*, 548 F.2d 228, 232 n.14 (8th Cir. 1977). The Tenth and Eleventh Circuits have noted the disagreement identified by petitioner without resolving the issue. *Echo Acceptance Corp.* v. *Household Retail Servs., Inc.*, 267 F.3d 1068, 1089 n.12 (10th Cir. 2001); *United States* v. *Pendas-Martinez*, 845 F.2d 938, 944 & n.10 (11th Cir. 1988).

Fed. R. Crim. P. 15(a), the parties are aware at the time of the deposition that any statements constituting inadmissible hearsay will not be admissible at trial. There thus is no unfairness under Federal Rule of Evidence 106 in applying the general hearsay rules to deposition testimony sought to be introduced at trial.

In addition, contrary to petitioner's suggestion (Pet. 13), the district court did not overrule his request to offer the hearsay statements only on the ground that Rule 106 permits the introduction only of evidence that is otherwise admissible. Rather, as to the Imrie testimony, the court found that excluding the redacted portions did "not in the slightest fashion * * * render misleading the rest of this testimony in any way." 7/17/01 Tr. 1485. When petitioner later moved for a mistrial on the ground that both the Screech testimony and Imrie testimony were misleading as redacted, the court denied the motion without elaboration. 7/23/01 Tr. 2208-2209. The court of appeals summarily affirmed the district court's rulings without discussion. Pet. App. A12.[6]

Rule 106 expressly requires the admission only of those additional portions of a writing or recorded statement "which ought in fairness to be considered contemporaneously with" parts that have been introduced. Fed. R. Evid. 106. Accordingly, this Court has explained that Rule 106 applies "when one party has made use of a portion of a document" and "misunderstanding

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[6] The government argued in the court of appeals that the excluded testimony was inadmissible hearsay, that petitioner did not timely object to admission of those portions of the redacted testimony alleged to be misleading, that exclusion of the redacted portions did not render the testimony misleading, and that Rule 106 does not afford a basis for introducing evidence that is otherwise inadmissable. Gov't C.A. Br. 57-63.

or distortion can be averted only through presentation of another portion." *Beech Aircraft Corp.* v. *Rainey*, 488 U.S. 153, 172 (1988).[7] The decisions cited by petitioner agree that Rule 106 permits the introduction only of additional portions of a document that are necessary to avoid misleading the trier of fact by qualifying, explaining, or placing into context the portions already introduced. *Awon*, 135 F.3d at 101 (statements not admissible under Rule 106 because not needed to correct any misunderstanding or distortion); *Sutton*, 801 F.2d at 1369 (Rule 106 "should be interpreted to incorporate the common-law requirements that the evidence be relevant, and be necessary to qualify or explain the already introduced evidence allegedly taken out of context"); *LeFevour*, 798 F.2d at 981-982 (additional portion of recorded statement not admissible under Rule 106 because no misleading impression was created by parts played to jury). Because the district court in this case found that the Imrie testimony as redacted was not misleading, and because neither the district court nor the court of appeals suggested that the Screech testimony was misleading, the opinions below do not conflict with the decisions cited by petitioner.[8]

Insofar as petitioner claims that the redacted testimony in this case was misleading, that factbound contention does not warrant review. Such a contention

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[7] The Court did not address in *Beech Aircraft Corp.* whether Rule 106 can provide a basis for admitting evidence that otherwise would be inadmissible. See 488 U.S. at 172-173 & n.18.

[8] Those decisions also suggest that the question whether Rule 106 allows the introduction of otherwise inadmissible hearsay is not of great practical significance. *Awon*, 135 F.3d at 101 (no error under Rule 106 because hearsay statements not misleading); *LeFevour*, 798 F.2d at 981-982 (same); *Sutton*, 801 F.2d at 1369 (error in refusing to admit clarifying statements harmless).

would lack merit in any event. As read to the jury, the redacted Screech and Imrie depositions established that petitioner directed the investments made by Plus One, a fact that the defense never disputed. The hearsay statements of Koppel related in the Imrie and Screech depositions concerned a different issue—the *ownership* of Plus One—and the redacted depositions do not state whether petitioner or his parents owned Plus One. The district court recognized that distinction in leaving open the possibility that it would permit the introduction of the redacted hearsay if the government opened the door by offering into evidence a particular declaration signed by Screech and Imrie (Form A) indicating that petitioner, not his parents, owned Plus One's funds. See note 2, *supra*; 7/10/01 Tr. 47-49. The government did not offer the Form A at trial. *Id.* at 88, 99.

Instead, the government established through a variety of other evidence that petitioner himself owned Plus One and had a history of claiming that others owned it when such claims suited his immediate needs. The government demonstrated, for instance, that petitioner had admitted ownership of Plus One to a cooperating witness. 7/11/01 Tr. 419-420, 444-445. The government also established that petitioner first claimed that Plus One was owned by his parents only after his indictment. For the decade before that, he signed numerous filings with the SEC identifying Imrie as the beneficial owner of Plus One, filings Imrie himself testified were false. 7/30/01 Tr. 3022-3027. Further, in the mid-1990s, petitioner caused Imrie to file a letter with the NASDAQ stock market that stated that neither petitioner nor any of his family members had an ownership interest in Plus One. 7/19/2001 Tr. 1857-1861. Finally, petitioner's claim that he established

Plus One to shield his parents' savings from the political and economic turmoil that then existed in South Africa was inconsistent with the investments Plus One made. For example, among the first investments petitioner directed Kestrel S.A. to make on Plus One's behalf was the purchase of South African currency, an investment that was highly sensitive to political and economic instability in that country. 7/30/01 Tr. 3029-3031. Rule 106 did not entitle petitioner to introduce Koppel's hearsay statements in the Imrie and Screech depositions in an effort to rebut that separate evidence concerning ownership of Plus One.[9]

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General
CHRISTOPHER A. WRAY
Assistant Attorney General
STEVEN L. LANE
Attorney

DECEMBER 2003

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[9] Petitioner sought to introduce an affidavit by Koppel suggesting that petitioner merely managed Plus One funds on his parents' behalf. The district court refused to allow Koppel's affidavit, and the court of appeals upheld the district court's determination that the affidavit lacked "corroborating circumstances indicating the trustworthiness of these statements." Pet. App. A10.